Supreme Court, U.S.
FILED
MAR 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1127

# In the Supreme Court of the United States

OCTOBER TERM, 1986

PATRICK H. WRIGHT, JR., AND
WILLIAM E. ARMSTRONG, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the government proved that petitioners' extortionate conduct affected commerce, as required by the Hobbs Act, 18 U.S.C. 1951(a).

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 797 F.2d 245. The opinion denying rehearing (Pet. App. 22a-23a) is unreported. The opinion of the district court (Pet. App. 24a-32a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-21a) was entered on August 18, 1986, and a petition for rehearing was denied on November 6, 1986 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on January 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Following a bench trial in the United States District Court for the Western District of Louisiana, petitioners were convicted of extorting money under color of official

right, in violation of the Hobbs Act, 18 U.S.C. 1951, and of conspiracy to commit that offense. They were each sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 1a-21a).

The evidence at trial showed that before 1980 petitioner Wright was the City Attorney for Monroe, Louisiana. He hired petitioner Armstrong as an assistant city attorney. In July 1980, Wright resigned from his position to enter private practice. That practice included the defense of "driving while intoxicated" (DWI) cases; Wright represented clients in numerous DWI cases that were prosecuted by Armstrong. Armstrong remained an assistant city attorney until he was removed in March 1984. Between late 1980 and mid-1983, Armstrong was the only assistant city attorney handling traffic offenses. Pet. App. 2a.

In November 1980, one William Burns was involved in an automobile accident with a large tanker truck. Burns suffered serious injuries and was rushed to the hospital. A blood sample taken from him at the hospital revealed that he was intoxicated at the time of the accident. Tr. 50-52.

An arrest warrant was sworn out for Burns in December 1980. When Burns heard that there was a warrant outstanding for his arrest, he contacted Armstrong to inquire about it. In the course of their conversation, Armstrong suggested that Burns retain a lawyer to institute a civil action against the owner and operator of the tanker truck. Armstrong suggested Wright as an attorney for Burns to retain in connection with his civil action.[1] Burns later re-

[1] Armstrong testified that Wright's name was only one of several names he gave to Burns (Tr. 1472-1473). However, the government introduced a transcript of the initial client interview between Burns and Wright (GX G24), which reflected that Wright and Armstrong had already discussed the Burns case, including Burns's medical expenses and his blood alcohol level (GX G24, at 6, 16; Gov't C.A. Br. 33-34). This evidence suggests that Armstrong may have sent Burns specifically to Wright.

tained Wright's law firm on a one-third contingent-fee basis to represent him in the civil action. Burns's lawsuit was filed in May 1981 and was handled almost entirely by an associate of Wright's. After the court in the civil suit entered an order upholding the admissibility of the results of Burns's blood alcohol test showing him to have been intoxicated at the time of the accident, the case was settled for $35,000. Pet. App. 3a.

Burns was never prosecuted for DWI. By March 1982, Armstrong had recalled the warrant, ostensibly because the charges against Burns had lapsed under Louisiana law. Pet. App. 3a.

After the settlement was agreed upon, Wright told his associate who was handling the case that Armstrong was to receive a referral fee of approximately one-third of the attorney's fee. When the associate protested, Wright spoke to Armstrong, and the two agreed that Armstrong would take $3,000.[2] Burns ended up receiving approximately $21,000, after expenses, and Wright's law firm paid Armstrong the $3,000 "referral fee." Pet. App. 3a-4a.

2. At trial, in order to establish that the extortion affected interstate commerce, as required by the Hobbs Act, the government introduced, inter alia, detailed testimony of Robert Voas, an expert in the field of alcohol and highway safety (Tr. 911-969). Voas testified that "[m]ost injurious crashes [are] strongly related to alcohol" (Tr. 926), and he indicated that the annual cost of alcohol-related automobile accidents is about $24 billion (Tr. 929-930). He stated (Tr. 947) that in his opinion, the failure to prosecute DWI cases results in more accidents

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[2] The government's theory at trial was that the payment was in exchange for Armstrong's not prosecuting Burns for DWI. Petitioners' theory at trial was that Armstrong received his share of the total attorney's fee simply for giving Burns a list of the names of possible attorneys, a list that included Wright's name.

on the nation's highways. With respect to an individual who is charged with DWI, Voas explained, such a person, "by virtue of having been arrested is known to research as having a higher risk in the future from that point on as compared to any other average driver of being involved in an accident [and] of being arrested in the future for drunk driving" (Tr. 938). Voas noted (Tr. 939) that if someone is convicted and has his license taken away, his chances of being in a DWI accident in the future are significantly reduced. Similarly, individuals who are arrested and convicted of DWI are more likely to obtain treatment and thereby reduce their risk of being involved in future DWI accidents (Tr. 939-940). Voas also testified (Tr. 944, 960-961) that if individuals are arrested for DWI and are not prosecuted, the deterrent effect of drunk driving laws is reduced. Moreover, Voas explained that even in a single case, the individual whose case is dismissed is thereby less deterred by the drunk driving laws, and others who know that person and learn of the dismissal will be less deterred as well (Tr. 946-947). In addition, Voas testified, the failure to bring DWI prosecutions where there is sufficient evidence to convict lowers the morale of police officers, and they are less inclined to make DWI arrests in the future (Tr. 945-946). Pet. App. 6a-7a.[3]

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[3] The government also offered testimony of two other witnesses on this issue. Norman McPherson, a program coordinator with the National Highway Traffic Safety Administration, testified that his agency's strategy to get drunk drivers off the road is to establish a perception that drunk drivers will be prosecuted and convicted (Tr. 970, 972). Hodges Walker, an insurance consultant, testified that the insurance premium of someone who has been convicted of DWI will be "much higher" than that of someone who does not have such a conviction (Tr. 975, 990).

In addition, an attorney defending the civil action brought by Burns testified that the prosecution of Burns for DWI "would have been one of the more important considerations we would have placed on attempting to settle the case" (Tr. 146-147, 183). Indeed, the defense

Crediting Voas's testimony, the district court found that the failure to prosecute the Burns DWI case had "an obvious and accumulated effect on interstate commerce" (Pet. App. 31a).[4]

3. On appeal, petitioners argued that the district court, sitting as the trier of fact, erred in finding that the alleged extortion affected interstate commerce within the meaning of the Hobbs Act. At the outset, the court of appeals noted that "the impact on interstate commerce need not be substantial to meet the statutory requirement" and that "[a]ll that is required is that commerce be affected by the extortion 'in any way or degree' " (Pet. App. 6a (citations omitted)). The court went on to conclude (*id.* at 7a) that because the district court credited Voas's testimony, "[petitioners'] argument that the government has overreached itself by prosecuting acts having an insufficient nexus with interstate commerce must be rejected." The court added (*ibid.*) that the district court's decision to credit Voas's testimony was not clearly erroneous.[5]

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attorneys handling the case "made repeated inquiries of Armstrong about the status of the criminal charges against Burns" (Pet. App. 27a-28a). The district court found (*id.* at 28a) that "[o]bviously the progress of [the] criminal matter was of interest to the attorneys in the civil case and might have had an effect upon it or its outcome." The court noted (*id.* at 27a) that Armstrong "use[d] his office in a manner which could have affected the outcome of the civil case."

[4] In addition, the district court (Pet. App. 26a-27a) rejected petitioners' claim that the $3,000 paid to Armstrong was simply a referral fee. It noted that (i) Armstrong had no client to refer to Wright's law firm; (ii) Burns was not aware of the arrangement; (iii) acceptance of a referral fee was a conflict of interest on Armstrong's part; and (iv) there was no agreement between Armstrong and Wright (or between Armstrong and Wright's law firm) providing for a fee for referrals.

[5] The government offered additional reasons why the extortion affected interstate commerce. For example, it argued (Tr. 1755; Gov't C.A. Br. 43-43a) that as a result of the dismissal of Burns's DWI case

Judge Brown dissented. Notwithstanding his belief that petitioners' conduct was "undoubtedly unethical, probably criminal, and should be not be tolerated in a democratic society," he concluded that the connection between the dismissal of Burns's DWI case and interstate commerce was insufficient to support the jurisdictional requirement of the Hobbs Act (Pet. App. 20a-21a).[6]

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and the law firm's payment of $3,000 to Armstrong, the law firm, which had an interstate practice, was left with less money. It also argued (Tr. 1755-1756; Gov't C.A. Br. 43-44, 46) that the insurer of the tanker truck (an interstate carrier) paid a larger settlement as a result of the dismissal of Burns's DWI case. And it argued (Tr. 1756; Gov't C.A. Br. 44) that commerce was affected by the dismissal of the DWI case because of the relationship between drunk driving accidents and insurance premiums. Petitioners argued that those asserted links to interstate commerce had not been listed in the indictment and therefore could not be relied upon (Pet. App. 8a). The government disagreed, arguing that the allegations in the indictment were sufficiently broad to encompass any effect on interstate commerce flowing from the extortion (Gov't C.A. Br. 45-46). Both the trial court and the court of appeals viewed Voas's testimony as adequate and therefore did not examine these additional links to commerce.

In addition to finding a sufficient nexus to commerce, the court of appeals rejected petitioners' claim that the evidence was insufficient to support their convictions. With respect to Armstrong, it noted (Pet. App. 9a) that the district court had found that Armstrong recalled Burns's arrest warrant and gave "different excuses at different times" as to why he took that action. In the court's view, "[t]he evidence support[ed] the conclusion that Armstrong accorded special treatment to that particular warrant" (*id.* at 13a). With respect to Wright, the court noted that he aided and abetted Armstrong's extortion "by actively inducing and soliciting the payment to Armstrong" (*id.* at 14a). Moreover, the court observed, when Wright's associate complained about the arrangement, Wright convinced Armstrong to take a smaller fee and convinced his associate to pay that fee (*id.* at 14a-15a). Finally, the court noted (*id.* at 15a) that "Wright and Armstrong conspired together to extort money from Wright's law firm" and that Wright's law firm, not Wright himself, was the real payor of the $3,000 check.

[6] Although Judge Brown voted in favor of panel rehearing, no judge on the Fifth Circuit voted to rehear the case en banc (Pet. App.

## ARGUMENT

Petitioners contend (Pet. 7-14) that the courts below erred in finding that the extortionate conduct involved in this case affected interstate commerce. Specifically, they argue that "in a Hobbs Act prosecution the effect on commerce must be an *effect of the extortion* and not an effect of the result of extortion or an effect presumed to arise from a class of conduct in which the defendant has participated" (*id.* at 12 (emphasis in original)). Contrary to their assertion, the case law does not support this vague and artificial distinction. The court of appeals' decision is correct and is fully in accord with the decisions of this Court and the other courts of appeals.

1. Under the Hobbs Act, 18 U.S.C. 1951(a), the government is required to prove that the alleged extortion "in any way or degree obstruct[ed], delay[ed], or affect[ed]" interstate commerce. As this Court has made clear, that statutory language manifests a congressional purpose "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see also *United States* v. *Culbert*, 435 U.S. 371, 380 (1978). Cf. *United States* v. *Darby*, 312 U.S. 100, 114 (1941) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) ("The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limits other than are prescribed in the Constitution.' ").

In light of Congress's intent to invoke the full breadth of its commerce power, the courts of appeals in Hobbs Act cases have uniformly held that the magnitude of the effect

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23a). In denying panel rehearing, the panel majority indicated (*ibid.*) that the government had established all the elements of a Hobbs Act violation, including a nexus to interstate commerce, "as elucidated in cases from this and other circuits as well as the Supreme Court."

on commerce is immaterial and that even a de minimis or potential impact on commerce is sufficient. See, *e.g.*, *United States* v. *Tuchow*, 768 F.2d 855, 870 (7th Cir. 1985); *United States* v. *Billups*, 692 F.2d 320, 331 n.7 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983); *United States* v. *Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982); *United States* v. *Zemek*, 634 F.2d 1159, 1173 n.20 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); *United States* v. *Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Harding*, 563 F.2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Starks*, 515 F.2d 112, 124 (3d Cir. 1975).

Petitioners' assertion (Pet. 12) that the effect on commerce must be an effect of the extortion and not an effect of the result of extortion would undermine Congress's intent under the Hobbs Act to use all of its power to punish extortionate conduct affecting interstate commerce. Moreover, it would be inconsistent with the unanimous circuit court holdings that even a de minimis or potential effect is sufficient. Petitioners have cited nothing in the legislative history of the Hobbs Act to support such a distinction. Beyond that, the arbitrary distinction petitioners propose would lead to absurd results. Under petitioners' theory, an "effect of the extortion" involving only a small amount of money would provide Hobbs Act jurisdiction, whereas a multi-million dollar "effect of the result of extortion" would not provide such jurisdiction. Such a result is without legal or logical support.[7]

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[7] Petitioners err in asserting (Pet. 7-9, 12) that the government's evidence showed only a class-wide effect on commerce. Voas's testimony revealed that the failure to prosecute an individual case increases the likelihood that that defendant and those who learn about the failure to prosecute that case will be involved in alcohol-related automobile accidents (Tr. 938-939, 946-947). In any event, the cases cited by petitioner (Pet. 9 n.5), which have upheld federal jurisdiction

Petitioners assert (Pet. 13) that prior to the present case, "no court had ever allowed the government to establish Hobbs Act jurisdiction with a showing of an impact on commerce less direct than the depletion of assets of an enterprise engaged in commerce." That claim is erroneous. For example, in *United States* v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982), a case similar to the present one, the court rejected precisely the distinction urged by petitioners here. The defendant in that case was convicted of attempting to extort money from a fictitious organization in return for assistance in the enactment of gambling-related legislation. The government introduced expert testimony showing the effects on commerce of expanded gambling activity, including an influx of tourists and workers from other states. In rejecting the defendant's claim that the nexus to interstate commerce was inadequate, the court explained (*id.* at 896 n.13 (emphasis added)):

> The government did not rely on the interstate commerce effects of the extortion payment, but on the potential effects of the gambling legislation for which defendant agreed to work. *The potential interstate commerce effects need not derive solely from the transaction involved in the extortion, but may arise from the natural consequences of the extortion.* In this case, the natural consequences were increased gambling and its concomitant effect on interstate commerce.

Accord, *e.g.*, *United States* v. *Anderson*, 809 F.2d 1281 (7th Cir. 1987) (payments by truck drivers to fix DWI tickets affected commerce because of the increased likelihood that the drivers would be on the roads in the future).

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based on class-wide effects in other contexts, confirm Congress's broad authority to regulate activity that in any way affects interstate commerce.

Likewise, in this case the government adduced evidence showing that the failure to prosecute DWI cases results in more alcohol-related automobile accidents on the nation's highways. As both courts below held, this evidence was sufficient to demonstrate that the failure to prosecute the Burns DWI charge had some actual or potential impact on commerce.

2. Petitioners' assertion (Pet. 12) that the present case conflicts with case law in the Second, Fourth, and Seventh Circuits is without merit.[8] The only Second Circuit case cited by petitioners is *United States* v. *Merolla*, 523 F.2d 51 (1975). That case does not draw the distinction urged by petitioners. Rather, that case turned on the fact that the government failed to show *any* interference with interstate commerce.[9] The court in no way ruled out the result reached in cases such as *Bagnariol, Anderson,* and the present case. Indeed, the Ninth Circuit in *Bagnariol* specifically noted (665 F.2d at 895) that its analysis was fully consistent with *Merolla.* And subsequent to *Merolla,* the Second Circuit has reiterated its consistent position that "[t]he jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce" and that "[e]ven a potential or subtle effect on commerce will suffice." *Angelilli*, 660 F.2d at 35 (citing cases).

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[8] Likewise without merit is petitioners' claim (Pet. 8) that the present case conflicts with decisions of this Court. This Court's decisions, such as *Stirone* and *Culbert,* underscore Congress's intent to use the full reach of its power to criminalize extortionate conduct that in any way affects commerce.

[9] The statement in *Merolla* (523 F.2d at 55) that only a "one-shot" enterprise was involved was made in connection with the court's rejection of a depletion of assets theory on the ground that the enterprise would not have used the funds paid to the defendants to make future commercial purchases. That reasoning does not apply to the issue raised here, which does not involve a depletion of assets theory.

The one case cited by petitioners from the Fourth Circuit, *United States* v. *Brantley*, 777 F.2d 159 (1985), cert. denied, No. 85-2003 (Oct. 6, 1986), likewise does not adopt the distinction they urge. In *Brantley*, the court simply held that a showing of an effect on commerce could not be based solely on "pretensive activity by FBI agents" in setting up a fictitious gambling house (*id.* at 161). Under Fourth Circuit case law it is clear, as it is elsewhere, that "even a *de minimis* effect on commerce resulting from a Hobbs Act extortion is sufficient to bring the charged criminal activity within the statute." *Billups*, 692 F.2d at 331 n.7.

Similarly, the Seventh Circuit has not adopted the distinction urged by petitioners. Thus, in *United States* v. *Anderson, supra*, the defendants took bribes to fix tickets issued to three truck drivers for driving under the influence of alcohol.[10] The court upheld Hobbs Act jurisdiction, reasoning that "[t]he fact that a truck driver is able to pay a bribe to obtain a favorable disposition on a ticket for driving under the influence of alcohol increases the probability that he will be able to drive in the future." 809 F.2d at 1286. In *Anderson*, it was not the extorted payments themselves that were determined to have affected commerce; rather, the court noted that commerce was affected by the fact that the tickets were fixed and the drivers thus enabled to stay on the roads. Put another way, it was the *result* achieved by paying the bribe that affected commerce, not the actual payment itself. The *Anderson* case demonstrates that in the Seventh Circuit, as in other circuits, an impact on commerce from the result of extortion may form the basis for Hobbs Act jurisdiction. See also *United States* v. *Lewis*, 797 F.2d 358, 367

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[10] Although each driver had transported articles across state lines and planned to do so again, one of the drivers to whom certain of the counts related was unemployed (*Anderson*, 809 F.2d at 1286).

(7th Cir. 1986) ("[A]ll the government's evidence must show is a realistic probability that, after the demand for payment was made (that is, the effect need not be simultaneous with the attempted extortion), there would be a *de minim[i]s* effect on interstate commerce."); *United States* v. *Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985) (noting that "[t]he commerce power reaches everything related to commerce, even though particular instances of a class of activities do not themselves occur in or affect commerce"), cert. denied, No. 85-924 (Feb. 24, 1986); *United States* v. *Staszcuk*, 517 F.2d 53, 60 (7th Cir.) (affirming Hobbs Act conviction in case involving payment in exchange for withholding opposition to zoning change to permit an animal hospital to be built, even though the hospital was never actually built), cert. denied, 423 U.S. 837 (1975).

The only case that articulates petitioners' distinction between the effect and the result of extortion is the Seventh Circuit's decision in *United States* v. *Mattson*, 671 F.2d 1020, 1025 (1982). In *Mattson*, city employees extorted money from a building maintenance worker in connection with his application for an electrician's license. The government argued that Hobbs Act jurisdiction existed because the issuance of the license would have affected the financial condition of the worker's employer and his outside electrical contractor (on whom the employer would no longer need to rely). In rejecting that argument, the court concluded that interstate commerce would not be affected because the worker himself "was not conducting a business engaged in, or purchasing items from, interstate commerce" and his employer never reimbursed him for the extorted payments he made to the defendant (*ibid.*). The court reasoned (*ibid.*) that a finding of an effect on commerce in that case would essentially mean that any extortion of money from any individual would satisfy the jurisdictional requirement. In the course of its opinion, the court stated, without citing any authority, that "[t]he

Hobbs Act requires that interstate commerce be affected *by extortion,* not by a result of extortion; there must be a nexus between extortion and interstate commerce before federal jurisdiction is present" (*ibid.* (emphasis in original)).

The *Mattson* court's holding was essentially based on the conclusion that there was not even a de minimis impact on commerce in that case. The court's distinction between commerce affected by extortion and commerce affected as a result of extortion was at best dictum, which was unnecessary to the result reached in the case. As *Anderson* and the other Seventh Circuit cases cited above reveal, the Seventh Circuit itself has not followed the distinction made in *Mattson.*[11] Indeed, the effect on interstate commerce in the present case—the likelihood of increased automobile accidents on interstate highways from the failure to prosecute DWI cases—was more substantial than the effect on commerce in several post-*Mattson* Seventh Circuit cases upholding Hobbs Act jurisdiction. See, *e.g., United States* v. *Murphy,* 768 F.2d at 1530-1531 (payments left attorneys with less money to purchase envelopes, stationery, and law books from outside the state), cert. denied, No. 85-924 (Feb. 24, 1986); *United States* v. *Boulahanis,* 677 F.2d 586 (7th Cir.) (social club's

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[11] Nor are petitioners aided by the Seventh Circuit's decision in *United States* v. *Elders,* 569 F.2d 1020 (1978) (discussed at Pet. 10). There, the government argued that "kickbacks" paid to a city official by a business doing work for the city artificially inflated prices paid by the city for the work, thereby depleting the city treasury of funds that would be used to purchase goods shipped in interstate commerce. The court rejected the argument because the government adduced no proof of the inflated prices, the depletion of assets, or the purchase of goods in interstate commerce. 569 F.2d at 1025. Here, by contrast, the government introduced evidence establishing that the failure to prosecute DWI cases increases the number of accidents on interstate highways.

extortion payments left it with less money from which to spend its customary $68 per month on coffee from out of state), cert. denied, 459 U.S. 1016 (1982).

Because the distinction drawn in *Mattson* between the effect and the result of extortion has not been followed in later Seventh Circuit cases, and because the language in *Mattson* was dictum and was unsupported by any legal authority, there is no basis for petitioners' claim of a conflict between the Fifth and Seventh Circuits. The decision in the present case therefore does nothing more than apply settled principles to a particular factual setting.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483:40266